

Original

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

WILLIAM FRANCIS, JR.

Plaintiff,

v.

Warden Thomas Carroll, et al,

Defendants.

:
:
:
:
:
:
:
:
:
:
:

C.A. No. 07-015-JJF
Jury Trial Demanded



**PLAINTIFF'S REPLY TO STATE DEFENDANTS' ANSWER TO PLAINTIFF'S
COMPLAINT AND AS AMENDED**

Plaintiff, pro se, submits this reply to state defendants' answer. This reply is not a waiver of plaintiff's claims and allegations raised by and in his **MOTION FOR DEFAULT JUDGEMENT**. Plaintiff specifically reserves the right to have such motion heard and adjudicated according to the well-established Federal Rules of Civil Procedure.

**Plaintiff's Suit For Money Damages Is Not Barred By The Eleventh Amendment To
The U.S. Constitution**

The State of Delaware or any of its agencies is not a party to this suit. For the purposes of specificity and judicial economy plaintiff is suing defendants Thomas Carroll, Stan Taylor and Joyce Talley in their individual capacities for an award of damages, and in their official capacities under the "the Ex Parte Young fiction" for injunctive relief in order to compel the Department of Corrections to obey the U.S. and Delaware Constitutions with respect to the claimed violations of plaintiff's constitutional rights. See Hafer v. Melo, 502 U.S. 21, 31(1991); Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 102-05 (1984); Ex Parte Young, 209 U.S. 123, 160 (1908).

Therefore, based on these averments, plaintiff's suit for damages is not barred by the Eleventh Amendment to the U.S. Constitution.

The Respondeat Superior Theory Does Not Apply And Has Not Been Invoked In Plaintiff's Suit Under Section 1983

The doctrine of respondeat superior does not apply in Section 1983 lawsuits and plaintiff has not applied or implied it in his complaint as amended. Monell v. Department of Social Services, 436 U.S. 659, at 691. Defendant Thomas Carroll is personally involved in the alleged constitutional violations and/or deprivations claimed by plaintiff (See Exhibit D), as plaintiff and a CMS employee brought plaintiff's grievance(s) to defendant Carroll's attention when the Inmate Grievance and Medical Grievance Committees were acting in collusion to frustrate and impede the exhaustion of administrative remedies process (See Exhibit E).

Defendant Thomas Carroll acted arbitrarily and capriciously when he issued a ban on any type of dental floss when dental floss has been sold at the Sussex Correctional Institution (SCI) for years (See Exhibit F). This fact establishes a violation of plaintiff's right to equal protection and deliberate indifference against defendant Carroll.

Defendants Stan Taylor and Joyce Talley are liable under this 42 U.S.C. Section 1983 action because they established, carried out and/or authorized the application and execution of the medical and dental treatment policies, pursuant to Title 11 Del. Code Section 6536(a) through (e), "Medical Care," that resulted in the violation(s) of plaintiff's constitutional rights. See Swint v. City of Wadley, 51 F.3d 988, 999 (11th Cir. 1995); Camilo-Robles v. Hoyas, 151 F.3d 1, 6 – 7 (1st Cir. 1998)(supervisor may be held liable under Section 1983 "if he [or she] formulates a policy or engages in a practice that leads

to a civil rights violation committed by another”; “supervisory liability does not require a showing that the supervisor had actual knowledge of the offending behavior; he [or she] ‘may be liable for the foreseeable consequences of such conduct if he [or she] would have known of it but for his [or her] deliberate indifference or willful blindness’”); Blyden v. Mancusi, 186 F.3d 252, 264 (2nd Cir. 1999)(“A supervisor may be found personally involved in a deprivation of rights in several ways: [H]e [or she] may be liable because he [or she] created a policy or custom under which unconstitutional practices occurred, or allowed such a policy or custom to continue.... Lastly, [he or she] may be personally liable if he [or she] was grossly negligent in managing subordinates who caused the unlawful condition or event.... “); Morris v. Dearborne, 181 F.3d 657, 672 (5th Cir. 1999)(while direct participation is not necessary for liability under Section 1983, plaintiff must prove that defendant “set in motion events that would foreseeably cause the deprivation of [plaintiff’s] constitutional rights”).

Title 11 Del. Code Section 6536(a) states in relevant part that: “The Department shall promulgate reasonable standards, and shall establish reasonable health, medical and *dental* services, for each institution, including preventive, diagnostic and therapeutic measures on both an outpatient and hospital basis *for all types of patients*.”

The nature and extent of such medical and *dental* services shall be determined by the *Commissioner of Correction* in consultation with the *chief medical officer* [CMS] of the Department.

The Department may authorize, under regulations, inmates to be taken, with or without guard, to a medical institution or facility outside the institution” [**Emphasis Added**].

Based on the above-referenced statutory provisions and directives, the issue of liability against defendants Thomas Carroll, Stan Taylor, Joyce Talley and CMS is indisputable and irrefutable.

Plaintiff Did Not Act With Contributory Negligence

Plaintiff did not act with contributory negligence simply because he initiated his repeated and specified requests for medical and dental treatment, he made staff and officials aware of his serious medical need(s) and the substantial risk of foreseeable harm if those needs were not sufficiently met, and dental staff has, on more than one occasion, observed that plaintiff brushes and cares for his teeth well enough to not have a cavity problem.

WHEREFORE, the State Defendants Thomas Carroll, Stan Taylor and Joyce Talley are liable to plaintiff for constitutional violations and deprivations as alleged and supported by plaintiff in his complaint and all subsequent pleadings.

/s/ William Francis, Jr. pro se

William Francis, Jr., pro se
SBI 264560, W-D-22
Delaware Correctional Center
1181 Paddock Road
Smyrna, DE 19977

Dated: September 5, 2007

Certificate of Service

I, William Francis, Jr. hereby certify that I have served a true and correct copy of the attached PLAINTIFF'S REPLY TO STATE DEFENDANTS' ANSWER TO PLAINTIFF'S COMPLAINT AND AS AMENDED upon the following parties/persons:

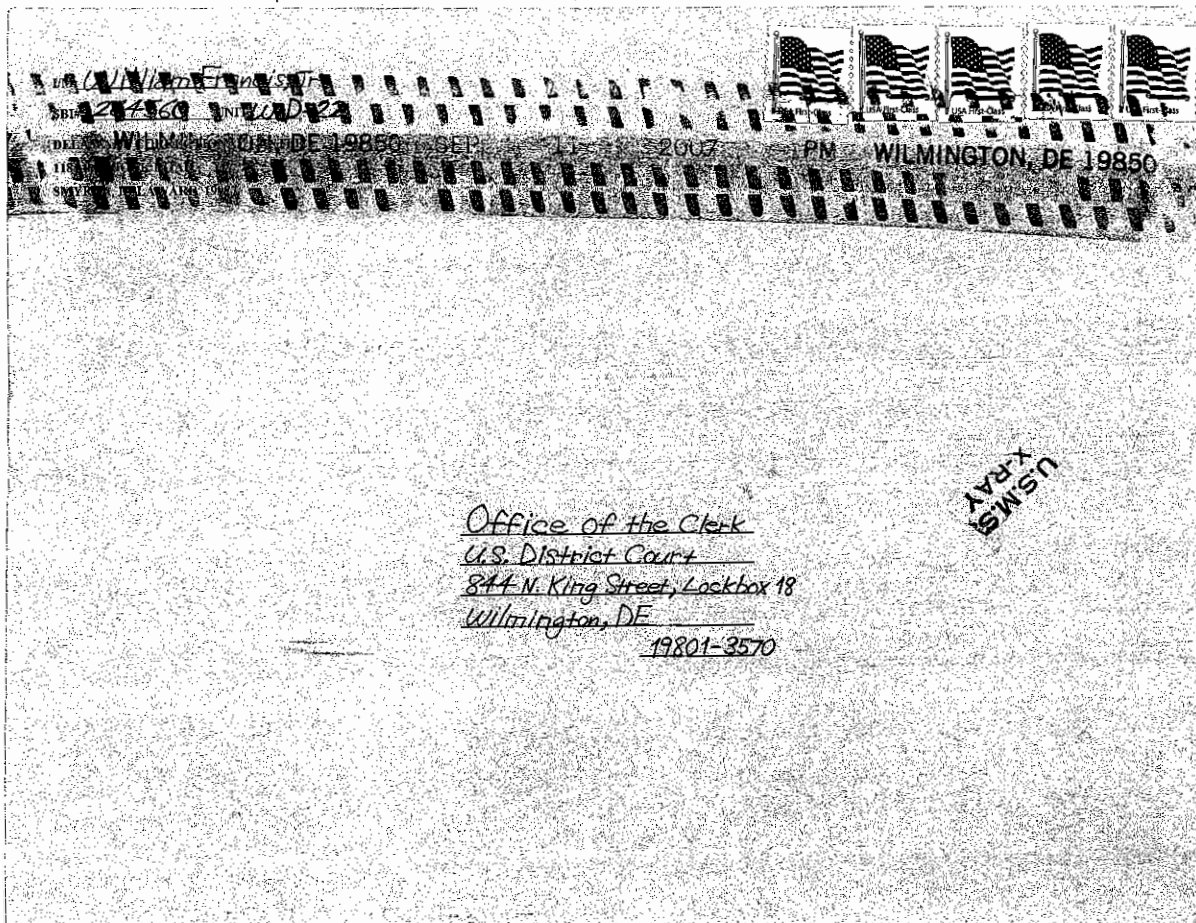
To: Ophelia M. Waters, Deputy Attorney General
Carvel State Office Building
820 N. French Street, 6th Floor
Wilmington, DE 19801

To: Megan T. Mantzavinos, Esquire
Ryan M. Ernst, Esquire
913 Market Street, #800
Wilmington, DE 19801

BY PLACING IN A SEALED ENVELOPE, and depositing same in the United States mail at the Delaware Correctional Center, Smyrna, DE 19977.

On this 10th day of September, 2007

William Francis, Jr., pro se
William Francis, Jr., pro se
SBI 264560, W-D-22
Delaware Correctional Center
1181 Paddock Road
Smyrna, DE 19977



To: Thomas Carroll, Warden

From: William Francis, Jr., SBI 264560, W-1, D-22

Subj: Grievance Appeal

Date: 11-14-04

This is my final attempt at informal resolution on the institutional level. I am appealing the rejection of my grievance (#5185), and the subsequent appeal to the Inmate Grievance Committee (#8211). I'm being denied the right to treat my periodontal disease with a flossing device, and would like to purchase a REACH ACCESS Flosser through the commissary or the Health Services Dept., or any comparable product.

Exhibit D



William Francis
SBI #264560 W1 D22
1181 Paddock Road
Smyrna, DE 19977

7 Dec 2006

Dear Mr. Francis,

I received your letter dated 5 Nov 2006 on 6 Dec 2006.

I reviewed your medical record in response to your concerns. Although you have a well documented history of periodontal disease, you have not submitted a sick call slip requesting dental care in over 1 year (9/4/05). The use of floss and picks in the institution is a security issue, not medical, and we cannot authorize devices for use that are prohibited by security. If you continue to have problems, please submit a sick call slip requesting an evaluation from our dentist.

Please continue to let me know if you have any more questions

Your Partner in Healthcare,

A handwritten signature in cursive script, reading "Scott S. Altman".

Scott S. Altman
Quality Assurance Monitor
Correctional Medical Services

CC: Warden Thomas Carroll
Medical Record

Exhibit E

FORM #585

MEDICAL GRIEVANCE



FACILITY: DCC
INMATE'S NAME: William Francis, Jr.
HOUSING UNIT: W-1, D-22, Single

DATE SUBMITTED: 4-19-05
SBI#: 264560
CASE #: 15828

SECTION #1

DATE & TIME OF MEDICAL INCIDENT: 4-19-05; 4:05 p.m.

TYPE OF MEDICAL PROBLEM:

I have been denied authorization to order, pay for and possess disposable and secure dental floss tooth picks needed to treat my periodontal disease. I am still seeking approval of dental floss tooth picks to treat myself based on the CDC's finding that untreated gum disease and no daily flossing contributes significantly to heart disease, heart attacks, strokes and high blood pressure.

GRIEVANT'S SIGNATURE: William Francis, Jr. DATE: April 19, 2005

ACTION REQUESTED BY GRIEVANT: Authorization to have access to the requested treatment tool, or a suitable alternative, based on a demonstrated need.

DATE RECEIVED BY MEDICAL UNIT: _____

NOTE: EMERGENCY MEDICAL CONDITIONS WILL TAKE PRIORITY. OTHERWISE, MEDICAL GRIEVANCES WILL BE ADDRESSED AT THE WEEKLY MEDICAL COMMITTEE MEETING.

RECEIVED

APR 20 2005

Inmate Grievance Office

E1

Instructions for Submitting a Regular Grievance

Inmates are required, per DOC Procedure 4.4 [Inmate Grievance Procedure] to attempt to resolve complaints prior to filing a regular grievance. Grievances are to be submitted within seven (7) days from the date of the occurrence or incident or within seven days after the inmate became aware of the incident. The grievance is to be placed in the grievance box located in each housing unit.

Only one issue per grievance form will be addressed. If the grievance is submitted on a weekend or a holiday, it will be received during the next working day.

Return of Unprocessed Grievance

Intake Action: This Grievance Form is being returned to the inmate under the provisions outlined in DOV Procedure 4.4 "Inmate Grievance Procedure" for the following reason(s) :

- ☐ **Vulgar/Abusive or Threatening Language.** The Language that is unacceptable has been highlighted. The grievance may be resubmitted omitting this language.
- ☐ **Non-Grievable.** This issue has been defined as non-grievable in accordance with DOC Policy 4.4. These procedures have their own appeal process that must be followed.
☐ **Disciplinary Action** ☐ **Parole Decision** ☐ **Classification Action**
- ☐ **Request.** Requests are not processed through the grievance procedure. Please correspond with the appropriate Office to secure the information that is requested.
- ☐ **Duplicate Grievance(s).** This issue has been addressed previously in Grievance # _____.
- ☐ **Original Grievances must be submitted to the Inmate Grievance Chairperson.** Photocopies are not accepted.
- ☒ **Inquiry on behalf of other inmates.** Inmates cannot submit grievances for other inmates.
- ☒ **Expired Filing period.** Grievance exceeds seven (7) days from date of occurrence.

Loss of any type has been a security issue for years. put in a sick Call slip.


 Inmate Grievance Chairperson

Date
 APR 27 2005

E3

William Francis, Jr.
Del. Corr. Center
SBI 264560, W-1 (D-22)

November 17, 2005

Mr. Richard Seifert
Prison Officer
Department of Correction
Administration Building
245 McKee Road
Dover, DE 19904

RE: Medical Grievance Appeal - Case # 15828

Dear Mr. Seifert:

I am appealing the denial of my medical grievance, the failure of the Inmate Grievance Chairperson to allow me to process my medical grievance through the proper channel(s) and the denial of my individual request for dental floss to treat my Periodontal disease on a daily basis.

The Inmate Grievance Chairperson is unqualified and not vested with the authority to deny or reject a medical grievance and request for medical treatment. I did not initiate Medical Grievance # 15828 as a class action and, therefore, it was inappropriate to reject or fail to process my medical grievance on the ground that "floss of any type has been a security issue for years"

I am a transferred inmate from the Federal prison system, and arrived to DCC in January 2004. Dental Dept. Staff had informed me that dental floss is accessible to inmates at SCI, MCI and WCI which are a part of the Dept. of Corrections. Products such as the REACH ACCESS DAILY FLOSSER and Dentak Floss picks are safe to use and do not pose any risk to security.

Further, Periodontal disease is a chronic disease and I'm requesting to be treated by a Periodontist in order to receive the necessary treatment and care (i.e. surgery, cosmetic dentistry) that the DCC Dental Dept. cannot provide.

This appeal and the forthcoming reply demonstrates that I have fully exhausted my Administrative-Internal Remedies. I expect your detailed response within 30 working days from the date of this appeal.

Respectfully submitted,

William Francis, Jr.

| 10/20/2006 | | | | | | | | | | | |
|-------------------|------|-----|-------------------------|-------|-----|------------------------|-------|-----|----------------------|--------|-----|
| Soaps | AMT | QTY | SHAVING ITEMS | AMT | QTY | NON-PRESCRIPTION | AMT | QTY | MISCELLANEOUS | AMT | QTY |
| Dial-1oz | 0.17 | | SHAVING ITEMS | | | ALLERGY CTNs | 1.38 | | Towels | 5.99 | |
| LE CLASSIQUE | 0.20 | | P SHV CRM | 1.62 | | 10% Ance | 1.87 | | Wash Cloths | 2.39 | |
| Soap Dish | 0.60 | | MAGIC SHAVE BLUE | 2.11 | | Anti fungal | 1.48 | | Socks | 1.19 | |
| | | | MAGIC SHAVE GOLD | 2.57 | | Antiacid Liquid | 3.06 | | Do Rags | 2.27 | |
| | | | | | | Antiacid Tabs 150s | 3.22 | | | | |
| Combs & Brushes | | | AFTER SHAVES | | | Artificial tears | 1.98 | | STATIONARY ITEMS | | |
| Combs-sm | 0.07 | | CRAWFORD MUSK | 1.22 | | Asprin 100 | 1.32 | | ENVELOPES-WHITE | 0.42 | |
| Afro-Piks | 0.42 | | AFTA FRESHSCENT | 2.47 | | Bayer Xtra 2 pk | 0.47 | | ENVELOPES-6X9 | 0.69 | |
| Hair Brush | 2.54 | | | | | Blistex | 1.90 | | ENVELOPES-10X13 | 0.69 | |
| Hair Ties | 1.10 | | DEODORANTS | | | Chap Stick | 1.34 | | WHITE NOTE PAD | 0.44 | |
| | | | HERITAGE ROLL ON | 1.18 | | X st Tylenol 2pk | 0.62 | | WHITE WRITING PAD | 0.72 | |
| | | | MN DEOD STK | 2.18 | | Foot Powder (Q.) | 3.84 | | YELLOW LEGAL PAD | 1.06 | |
| Hair care | | | MN MUSK DEOD STK | 2.18 | | Halls Cough Drops | 0.68 | | COLOR PENCILS EAGLE | 2.42 | |
| VO5 conditioner | 1.52 | | AQUA SPORT GEL A/P | 2.84 | | Hemorrhoid Oint. | 3.28 | | # 2 PENCIL W/ ERASER | 0.12 | |
| VO5 shampoo | 1.52 | | POWERUP Dry | 2.18 | | Hydrocortisone crm | 1.38 | | PENS CRYSTAL | 0.24 | |
| Suave Shampoo | 2.28 | | | | | Ibuprofen | 2.33 | | Card Stock | 0.06 | |
| HYPO-A Shampoo | 1.76 | | LOTIONS & OILS | | | Medicated Chest Rub | 1.79 | | Shoe Sting | 1.00 | |
| MAX BODY Shampoo | 1.48 | | LOSIONS & OILS | | | Milk of Magnesia | 2.03 | | PHOTO ALBUMS | 2.36 | |
| | | | LOSIONS & OILS | | | Muscle Rub | 1.94 | | CERAL BOWL W/LD | 0.58 | |
| Dandruff shampoo | 2.84 | | COCOA BUTTER LOTION | 1.86 | | Natural Veg. Pwdr. | 4.94 | | BOWL W/LD TUPPERWARE | 3.64 | |
| | | | COCOA BUTTER STICK | 1.20 | | Non Asprin 100 | 2.08 | | SPOON/FORK | 0.14 | |
| Sulfur * cond. | 3.37 | | NOXZEMA | 1.92 | | Tanning Lotion | 2.54 | | TASTER CHC MUG | 1.80 | |
| Sulfur 8 shampoo | 3.60 | | PETROEUM JELLY | 0.92 | | Roloids | 0.65 | | TUMBLER W/LD | 0.47 | |
| VO5 Hairdressing | 3.72 | | SKIN CARE LOTION | 1.76 | | Stress Pepto Liq *8oz. | 2.18 | | Shopping Bag | 0.39 | |
| Dandrex | 3.37 | | Norm skin tone | 5.12 | | Sunblock | 3.46 | | | | |
| Hair grease | | | SCENTED OILS & LOTIONS | | | Tanning Lotion | 2.57 | | WATCHES | | |
| Murray's Pomade | 2.12 | | CK1 OIL | 3.95 | | | | | WATCH | 18.69 | |
| PRO GLO Pomade | 1.55 | | ETERNITY OIL | 3.95 | | | | | | | |
| Royal crown | 1.68 | | CK1 LOTION | 2.62 | | BODY SUPPLEMENTS | | | FOOT WEAR | | |
| | | | ETERNITY LOTION | 2.62 | | AMINO'S 1900-110'S | 4.74 | | Nike | 45.50 | |
| Styling gel | 2.36 | | Powders | | | DAILY VITAMINS | 3.95 | | ReeBox | 43.00 | |
| Oral Hygiene | | | Baby Powder | 1.61 | | MILK & EGG | 7.80 | | FLIP FLOP | 0.91 | |
| Dental Floss | 1.57 | | Bath & shower | 1.82 | | POWER BARS | 1.20 | | WIDE BAND | 3.07 | |
| colgate | 1.40 | | THEMOS SHIRTS Sm -xLg | 2.85 | | CLOTHING | | | SHOE LACES | 1.00 | |
| colgate WHITENER | 2.40 | | THEMOS SHIRTS 2XL | 3.09 | | T-Shirts S-L- Xi | 2.32 | | SUPER THREE RADIO | 44.43 | |
| colgate Total | 3.46 | | THEMOS SHIRTS 3XL | 3.36 | | T-Shirts xxi | 3.46 | | MAG 13" TV | 121.10 | |
| Effident ind. pk | 0.12 | | THEMOS SHIRTS 4XL | 4.68 | | T-Shirts xxxl | 3.60 | | 6' EARPLUG | 2.39 | |
| | | | THEMOS PANTS Sm -xLg | 2.85 | | T-Shirts 4xl | 4.18 | | ANTENNA CABLE | 9.65 | |
| Mouthwash mint | 1.19 | | THEMOS PANTS 2XL | 3.09 | | SHORTS S-MED | 9.96 | | Fans 12" | 30.57 | |
| Elegrip | 5.32 | | THEMOS PANTS 3XL | 3.36 | | SHORTS Lg-1XL-2XLG | 10.26 | | Alarm Clock | 8.13 | |
| | | | THEMOS PANTS 4XL | 4.68 | | SHORTS XXXLG | 11.76 | | Boxers sm-XL | 1.92 | |
| toothbrush | 0.38 | | Sweat Shirts Small & XL | 9.96 | | SHORTS X4XLG | 38.10 | | Boxers 2XL-3XL | 2.04 | |
| toothbrush Holder | 0.40 | | Sweat Shirts XXL | 11.40 | | Sweat Pants UPTO XL | 12.30 | | Boxers 4XL | 2.16 | |
| Baseball caps | 4.50 | | Sweat Shirts XXXL | 12.30 | | Sweat Pants 2XLG | 13.80 | | PJs L-XL | 17.33 | |
| | | | Sweat Shirts 4XL | 13.50 | | Sweat Pants 3XLG | 24.90 | | Sweat Pants 4XLG | 32.10 | |

PRICES SUBJECT TO CHANGE WITHOUT NOTICE

D. M. Pico